

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

JAMAICA CAR WASH CORP.

And

**RETAIL WHOLESALE AND DEPARTMENT
STORE UNION (RWDSU)**

Case No.: 29-CA-169069

**BRIEF IN RESPONSE TO EXCEPTIONS
FILED BY THE GENERAL COUNSEL
ON BEHALF OF JAMAICA CAR WASH**

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INTRODUCTION

The Administrative Law Judge (“ALJ”) issued findings of fact and conclusions of law in this matter on January 9, 2017, that were correctly based upon the testimony and exhibits that were produced at trial. The ALJ examined the testimony and exhibits collectively and individually where appropriate. The decision was well reasoned and each and every finding was based upon the record and exhibits.

The General Counsel (“GC”) failed to produce any evidence either by testimony or exhibit, that the subject employee was ever engaged in any pro-union protected activity or that the employer believed he was engaged in pro-union activity. The GC’s presentation at trial was made by innuendo and conclusions without any convincing evidence that Castillo was ever concerned or even knew the purpose of a union. No evidence was produced that the employer knew or believed Castillo was supported the union, or that Palacios was motivated by any anti-union animus.

The GC concluded that evidence produced at the trial supported a “scheme” that the employer tried “to get rid of the union.” The GC ignored the uncontested fact that for the entire three-year period that the union had been at the premises and, there was never a grievance or arbitration nor any terminations. Additionally, the GC ignored the fact that the employer testified the union was, in reality, an asset and neither the owner nor the manager had any issue with the union’s presence. The GC chose to ignore the harmonious relationship the Respondent maintained with the union which clearly begs the question; why would the employer fire an employee after three weeks, for undefined and unknown union activity? Why would the employer want to get rid of an employee who never uttered one word about the union, nor

engaged in any pro-union activity? The employee did not even understand the purpose of a union.

The answer to these questions according to the GC is solely based on one fact alone – the alleged conversation in mid-December and February 28, 2016, with Gomez wherein the employer allegedly made it known that he did not want the union.

The GC failed to produce any evidence of the “scheme” or plan or any other action taken by the employer toward ridding itself of the union. Moreover, not one witness or employee supported such a conclusion of a scheme and in fact one employee actually supported the fact that the Respondent never engaged in any anti-union activity.

The hearing lasted five days in which testimony and exhibits were introduced by both sides. Relying on the testimony and exhibits, the ALJ issued a well-reasoned decision which was based upon that testimony; the credibility of the witnesses; common sense; and exactly what those witnesses actually knew and did not know. The GC’s case is based solely upon speculation and upon conversations that were rejected by the ALJ and could not be established by any evidence to the contrary. It makes no sense that a three-week employee who did not understand the meaning of a union, was fired because he supported the union. There were over fifteen employees that worked for the employer and not one shred of evidence was produced that the employer ever engaged in anti-union activity or held animus towards any one of them because of the union.

Respondents will reply to every exception set forth by the GC in the order in which they were presented.

RESPONSES TO EXCEPTIONS

I. *Exception 3: The ALJ Did Not Base His Findings of Fact and Conclusions of Law on the Credibility of Witnesses.*

The GC attacks the ALJ's credibility determinations by simply stating that the ALJ did not make a proper finding. Their support is based upon the allegation that the ALJ did not analyze every witnesses' demeanor in detail and failed to specify which testimony is discredited. In other words, the ALJ failed to articulate a basis for every credibility determination.

The GC requests that the Board overturn improper credibility determinations as they are allowed by Board law. (GC brief page 24). Generally, the Board will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces the Board that they are incorrect. *See Standard Dry Wall Products*, 91 NLRB 544 (1950). Thus, the Board should not overturn any of the ALJ's credibility findings unless the preponderance of the evidence convinces the Board that the findings are incorrect. *See id.*

The GC would have the Board believe the ALJ failed to "analyze the witnesses' demeanor" and therefore would be in line with Board policy if it proceeded to an independent evaluation of credibility. (GC brief pg. 23). However, GC's assertions are both factually and legally incorrect.

The ALJ's decision explained how he assessed credibility throughout the entire decision: "The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, *the demeanor of the witnesses*, and the teachings of *NLRB v. Walton Mfg. Co.*, 269 U.S. 404, 408 (1962)." (ALJD, 13:46-48). The ALJ set forth all the factors he considered in making his credibility determination and therefore the ruling is in full compliance with Board law.

The GC attacked the ALJ's credibility determinations by stating "The ALJ failed to articulate a basis for crediting Respondent's witnesses over the GC's witness, particularly in light of the fact that he had already explicitly discredited Respondent's witness, Diego Echeverry." (GC Brief, 24). The GC fails to explain why the ALJ must make the same lengthy analysis for every single witness and all their statements as he did with Diego Echeverry. To put in perspective, Diego Echeverry's testimony in the totals less than thirty (30) pages of the entire transcript of the proceedings. A thorough analysis of the entire transcript of every part of all the testimony would be a herculean task and the GC does not cite to any case law which states the ALJ must articulate his basis for every finding of credibility in the decision.

Furthermore, the GC cites to *Stevens Creek Chrysler Jeep Dodge, Inc.*, claiming that the ALJ's decision regarding the testimony of Castillo and Gomez is unsubstantiated and improper. The GC claims that "Pursuant to the above case law [*Stevens*], the Judge's unsubstantiated comment does not constitute a proper credibility analysis or resolution." (GC brief pg. 23). However, the GC's analysis and reliance on *Stevens* is misguided at best, and dishonest at worst. The Board in *Stevens* did not overturn the judge's decision because of a general rule that a judge must make a detailed analysis of all of the credibility findings, but rather because, "the judge disregarded the Board's instructions on remand to reanalyze Rocha's discharge by making clear credibility determinations and explaining the basis for those determinations." *See Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 636.

Those instructions were not the norm, but given under exceptional circumstances that were wholly unique to that specific case. There is no general requirement that an administrative law judge provide a sub-explanation for demeanor-based credibility resolutions. *See Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 420 (2004). The Administrative Procedures Act only

requires that there be a basis for findings of fact. *See id; see also* 5 U.S.C. §557(c). In fact, “[a] demeanor-based credibility resolution is itself a basis for a finding of fact.” *See id.* There is no requirement that the ALJ make a detailed ruling on the credibility determinations. Therefore, contrary to the assertions of the GC, the ALJ made proper credibility resolutions according to Board law and routine procedure.

II. *Exceptions 1, 2, 4-13, 31: The ALJ Erred in Failing to Find that Respondent Threatened Employees With Futility and Termination, Promised Employees Benefits for Relinquishing Support for the Union, and Instructed Employees not to Speak to Union Representatives.*

At the outset, it should be noted that on pages 4-6 of the decision, the ALJ thoroughly examined the testimony regarding the December 3rd meeting. Each and every part of the testimony from both sides were analyzed by the ALJ. Then, on pages 16-18, the ALJ carefully articulated his decision based upon the testimony of each party.

For inexplicable reasons, the GC believes the ALJ determined that employer threats against the union did not happen because they did not report it to the union steward. Our understanding of the ALJ decision is quite the contrary.

The ALJ examined the December 3rd interview of Castillo and Gomez by detailing what was discussed in the interview. This was important because of the profound lack of understanding that Gomez and Castillo had of a union. They had no understanding of unions and when they were told of a union, their sole concern was about union benefits. Neither employee inquired any further about the union, either negatively or positively. The ALJ then examined the testimony of Palacios, the manager of the car wash. It was after considering all of that testimony, the ALJ stated that he did not credit “the testimony of Castillo and Gomez as credible, that anti-union animus comments were made by Palacios on or about December 3 or mid-December 2015.”

Despite the GC's assertions to the contrary, the ALJ considered a number of factors and testimony in determining that employees were not threatened with termination or promised any rewards for breaking with the union. Those factors were;

- a) Castillo and Gomez never reported the comments to the shop steward or union representative or any other employee according to their testimony.
- b) There were many members of the bargaining unit but those two employees were the only individuals alleging the threats. If the Respondent really wanted the union out, would not other employees have also heard anti-union statements? It was not credible that Palacios spoke to any two employees, who didn't know what a union was and somehow determined that those two employees actively supported the union.
- c) The Respondent and union had a working relationship for three years that was void of any labor issues. There were never any grievances or arbitrations. The GC could only speculate on the Respondent wanted to get rid of the union because of impending negotiations of the Collective Bargaining Agreement.
- d) The one disinterested employee who testified about the Respondents' actions and words was credible, specific, and denied any anti-union conversations by the Respondent to any employee. That employee denied all the components of the Charge dealing with threats by the Respondent to the employees.
- e) The ALJ found that both Gomez and Castillo lacked credibility and set forth exactly why he did not believe them.
- f) Gomez was subjected to the same alleged anti-union comments as Castillo, but he was not allegedly dismissed.

It was not one factor alone that the ALJ used as the basis of the decision. Rather, the ALJ based the decision upon a cumulative examination of all the testimony or absence of testimony along with common sense. The point is that a worker who seemingly did not understand what a union was and who never engaged in any union business is now the person the GC maintains was fired for undefined union activities or the belief he was engaged in union activities.

The GC's exceptions are tenuous at best. Their argument is that there was a meeting in mid-December 2015 where Palacios told Gomez that Castillo would be fired because he supported the union. The only evidence supporting anti-union animus proffered by the GC is the conversation between Gomez and Palacios in December and February. There were no witnesses to that conversation. The ALJ found that the February alleged meeting never occurred.

The GC submits that the mid-December meeting with Gomez and Palacios was sufficient to "send a message to its workforce that they could be fired for supporting the union", GC brief pg. 28, even though not one member of the workforce would support that statement. Certainly, if that conversation had occurred, it may be a fact worth considering. Moreover, the GC tried to prove a second meeting took place in February and then suggested those two meetings supported the basis of the Respondent's anti-union animus.

The missing fact in the foregoing GC argument is that there was never any direct or indirect evidence that Respondent believed Castillo supported the union. The GC acknowledged on page 30 of their brief, "the GC never argued that Castillo engaged in union activity." Their entire case is based upon a mid-December meeting between Gomez and Palacios where Palacios allegedly told Gomez he believed Castillo supported the union. Palacios admittedly never asked Gomez if Castillo supported the union; he never inquired from Gomez whether Castillo supported the union; and he never spoke of any facts that could liberally be construed as factual support that Castillo supported the union. Hence, there is no clear supporting evidence that Palacios believed Castillo supported the union.

The GC contends the ALJ was incorrect when he concluded Gomez never explained why Palacios believed Castillo supported the union. Gomez's explanation was strange in that, Palacios told him he heard from others that Castillo supported the union. Neither Gomez nor Palacios ever identified any individual, nor was any other individual called to testify by the GC, that Palacios was told Castillo supported the union. Gomez also failed to explain how he learned of Palacios's alleged belief that Castillo supported the union. Consequently, the only testimony the ALJ was given was a general statement of hearsay nature and without any individual identification of the declarant. Additionally, this unidentified person allegedly told Palacios of Castillo's union support and that is their basis of "pro-union activity." That is simply a colossal leap of speculative hearsay that should not merit any further consideration.

The GC cites Tr. 120 as their alleged support in the record of the foregoing – Palacios spoke to Gomez about Castillo's union support. However, on Tr. 119, Gomez testified the following:

Q: What, if anything, did Mr. Palacios say about Yovanni Castillo?

A: Whether I knew if he had anything to do with the union or if he was supporting the union.

Q: And did you respond?

A: I told him I didn't know anything.

Gomez generally did not know anything about Castillo especially about his feelings or actions about the union. The GC never pursued any inquiry on that topic. Gomez essentially testified he knew nothing about Castillo and the union. (Tr. 119). Not one other witness was presented that knew anything about Castillo and the union. It was not until the GC realized Gomez could not say anything supportive was the question on Tr. 120 asked. Gomez stated that Palacios was going to fire Castillo because he did not want further union support.

After Gomez had admitted “he did not know anything” (Tr. 119) he pivots and then changed his testimony by adding that Palacios told him he would be fired for union activity. The ALJ made the same conclusion that any reasonable person would make, that is, that conversation never took place. It makes no sense that Palacios would say that to a friend of Castillo and not tell him exactly what he believed Castillo was engaged in. It also makes no sense that Palacios would share his thoughts of firing someone close to Gomez with him in a conversation in the car. Both sides readily admit the record lacks any firm explanation why the Respondent believed Castillo supported the union. However, the GC believes that employees were threatened by Respondent. The GC supports this by suggesting the ALJ should have considered the motivation behind the testimony given at Tr. 120. That just does not make any sense nor is it logical in any interpretation.

In summary, the GC admits that Castillo did not engage in union activity but the Respondent “believed” Castillo supported the union. That belief is solely supported from Palacios’s conversation with Gomez when he admits he knows about Castillo from an unidentified person who never testified. It does not make sense for Palacios to make such a statement to Gomez when he never knew Gomez and knew Gomez and Castillo were very close.

The ALJ found the alleged second conversation of February 28 never took place as well. It was not reported to Hernandez, the shop steward, or any other employee. The GC states that the record establishes Palacios did not deny he met with Gomez nor did he deny he “interrogated” Gomez about Castillo’s union support. The GC states the ALJ relied on Tr. 381 for the basis for ruling the meeting never happened.

However, the GC completely misstates Palacios's testimony on page 381 of the transcript. During this line of questioning, Palacios was questioned about his knowledge of Castillo in late December. Palacios testified about his knowledge about Castillo taking another job which he knew from Gomez. Palacios was asked the following at the hearing:

Q. Did you ever say anything to Mr. Gomez or Mr. Castillo about the union after you interviewed them?

A. No. The regulations are there about the union. (Tr. 381).

The ALJ concluded from Palacios's answer that "Respondent proffered a general denial that there was a conversation between Gomez and Palacios in mid-December." (ALJD 6:29-31). The ALJ as well as Respondents' counsel understood this answer to mean Palacios testified that he did not speak at all about the union to either Gomez or Castillo after their December 3 job interview. This testimony acts as a denial of the mid-December meeting and February 28 meeting with Gomez because those meetings supposedly centered on Castillo and his alleged union support or activity.

The ALJ also set forth why he believed these two different conversations of December and February never took place which is on page 19 line 50;

- a) There is no evidence, including any motivation, that Castillo supported the union and the GC admitted as much
- b) Gomez never reported that conversation to the shop steward or anyone else.

The GC believes Tr. 381 was the basis of the ALJ decision that the Palacios and Gomez conversation of February 28 never took place. On page 6 of the decision the ALJ outlines many more reasons in addition to what occurred in the trial.

Assuming the ALJ is correct that the February 28 meeting between Palacios and Gomez never took place, the GC's singular piece of evidence is the mid-December meeting. It does not make sense that Palacios would discuss personnel issues and the dismissal of Castillo with Gomez in a car about an employee who worked for only two weeks. The fact that Gomez never told Hernandez that his cousin was going to be fired is shocking and reveals the improbability of such a conversation. Moreover, Gomez testified he worked with a number of employees but never shared any of that conversation with any of those employees.

Palacios Testimony

The GC submits that Palacios lied about communicating with Castillo and then was confronted with texts as well as the recording. That is boldly untrue. Tr. 48 – 44 contains this testimony and on page 48 Palacios specifically stated;

Q: Did he call you later that day – didn't he?

A: To tell you the truth, I don't remember. I really don't because that day I was at...

That answer by Palacios demonstrates the GC is totally incorrect when they state Palacios lied about communications to Castillo. Palacios simply did not remember. The ALJ did not ignore any testimony as the GC suggests. After the recorded phone conversation was played, Palacios never denied the conversation, but rather, he just did not remember what he said in that conversation. The GC's question was confined to the recording. This is a total mischaracterization of the testimony by the GC. When it came to the texts sent by Castillo to Palacios, the GC asked Palacios if texts were sent and he answered he did not remember (Tr. 36).

The GC misstates and distorts the testimony regarding the recorded conversation. The GC stated Palacios continued to lie by stating certain words were used in a recorded conversation. Those words were “later you can come back.” Their brief urges the Board to believe Palacios testified he actually said those words to Castillo and the recording proved otherwise. Nothing could be further from the truth.

Looking at Tr. 83, line 24, the question was asked, “So the question is what did you mean by that?” Palacios answered what he meant by the use the words in the conversation. It was his subjective opinion that he gave of a recorded conversation months earlier. He answered on what he “meant” and what he believed he was saying when those words were spoken. The GC wants the Board to believe he was testifying of words he actually used and now they “caught him in a lie.” Unfortunately the GC decided to ignore the question that preceded their quote on page 84.

Fernando Magalhaes

The GC completely distorted the testimony of Magalhaes and submits that he made certain statements because the shop steward said he did. At the outset, it must be pointed out that Magalhaes testified his relationship with the union is “very good.” (Tr. 308). He never threatened anyone nor made any promises as the GC suggests. (Tr. 313). In fact, he had no criticism of the union or vice-versa. (Tr. 313).

There was one issue which he testified about concerning the mistaken belief by the union the bonus due at Thanksgiving was not paid. The union realized it was paid and the matter was resolved without any formal grievance or meeting. Other than this instance, his relationship was fine and mutually beneficial.

For the GC to suggest otherwise, as they do in page 35 of their brief, is simply unsupported by the testimony or exhibits in this matter. The threats that the GC references come from the testimony of the union steward. Certainly, Magalhaes was upset at being charged with firing Castillo when he never fired anyone. (Tr. 327-328). The GC boldly and without any basis states that Magalhaes admitted “harboring animus” because of the bonus issue. The GC did not note that the bonus issue was characterized by Magalhaes as a “misunderstanding” and nothing more. (Tr. 309). In fact, it was the GC who stated this issue “was not relevant.” (Tr. 310). The issue was resolved and everyone moved on. (Tr. 311). For unknown reasons, the GC thinks Magalhaes did not get along with the union, and once again, their only evidence is hearsay.

In summary, Magalhaes was upset when he was told he fired Castillo. He knew he did not fire Castillo nor did his manager, Palacios. Months after Castillo abandoned the job, the union in a desperate attempt to curry favor with a disinterested workforce, claimed that Castillo was fired. Magalhaes was upset and certainly made his feelings known. The GC and/or union have taken those comments as proof of Castillo’s termination. They ignore all the positive testimony of the union by Magalhaes.

III. *Exceptions 14 & 15: The ALJ Failed to Find on Feb. 25, 2016 Respondent Threatened Employees for Engaging in Union Activity*

The GC's exceptions center on a meeting held on February 25, 2016 concerning the allegations that Castillo was fired. By way of background, the Respondent believed Castillo had left for another job on or about December 22nd. He was on the schedule for the car wash on January 3rd, 2016, but Castillo decided to move on from the car wash and told his cousin, Gomez, who informed Palacios.

Almost two months later, Magalhaes received a petition signed by employees of another carwash alleging he dismissed Castillo. Understandably, Magalhaes called a meeting with Hernandez and Palacios to be "clear on what happened" because the union never called him. (Tr. 322-323). He had received a Charge from the union on February 4th, 2016. He specifically testified Castillo was never fired. (Tr. 335). He was upset he was accused of firing Castillo.

Magalhaes actually testified he had no idea how Castillo felt about the union. (Tr. 337). He then testified to a fact that the GC never understood; that he "has to work with the union... and it's better for me... and the union sometimes works for my benefit." (Tr. 337).

The alleged threat that the GC quotes on pages 36 and 37 of their brief refers to statements by Hernandez, the shop steward – not Magalhaes. The statement "you're going to see what happens" is a statement by Hernandez claiming Magalhaes made such a comment which had nothing to do with these Charges. Neither Respondent's counsel nor the GC ever asked Magalhaes if he made such a statement. He just was not given the opportunity to deny making the statement in the hearing.

IV. *Exceptions 16-21: The ALJ Erred in Failing to Find on February 28, Respondent Unlawfully Interrogated Gomez*

Undoubtedly the alleged meeting of February 28, 2016 between Gomez and Palacios is a critical piece of evidence in this entire proceeding. As stated previously, the ALJ's reasoning for finding the conversation did not take place was based on a number of several findings which he set forth in the decision. It was partly based on credibility, common sense, and the evidence and lack of evidence presented.

The GC may find the ALJ decision "difficult to discern" but it was not solely on the fact that the GC could not corroborate the conversation. The ALJ examined the entire testimony that Gomez, who worked on February 28, 2016, took a trip in a car with Palacios. Allegedly, Palacios interrogated him in the car because a union representative was at the car wash on February 25th questioning whether Castillo was discharged and Palacios decided that questioning Gomez about it would be a prudent decision. It is very easy to understand why the ALJ did not believe such a conversation took place considering all the facts to that point. It defies logic that Palacios would confide in Gomez, a family member of Castillo about such a sensitive subject.

Of particular note is the fact that the GC called Palacios as their opening witness and was questioned for several hours but never once did the GC ever ask Palacios if he had a meeting with Gomez on February 25, 2016. Again, several days later, Palacios was recalled by the Respondent and was questioned on the meeting. The GC failed again to ask about a February 28, 2016 meeting. The only basis for submitting that a meeting took place is the testimony of Gomez and not one single piece of evidence or testimony confirming such a meeting exists was ever presented by the GC.

Hence, the ALJ could only evaluate the testimony of Gomez as to that alleged meeting. It is noted by the ALJ that the only testimony by Gomez about Castillo was “whether he knew something about the union and Castillo.” Gomez admitted he knew nothing about Castillo’s relationship with the union and then testified that the conversation with him and Palacios continued on for 40 minutes. That testimony by Gomez was simply impossible to believe.

Besides all the foregoing, there was no corroboration, even with the shop steward or anyone else of the February conversation. The alleged unidentified person who spoke to Hernandez was not called as a witness nor his name disclosed. More importantly, that conversation took place two months after an alleged discharge. The ALJ’s reasoning makes perfect sense, and was based upon common sense and the credibility of the witnesses.

The GC misunderstands the ALJ’s purpose for pointing out the lack of corroborating testimony or evidence. The GC believes the ALJ used the lack of corroborating evidence or testimony as a factor under the *Bourne* factors. (GC brief pg. 38). That is not true. The ALJ used that lack of information as a factor in ruling that the actual “interrogation” never occurred, not as a legal matter, but factually. To our understanding, the ALJ believes there never was any questioning of Gomez by Palacios. The GC believes the “ALJ is simply wrong” because there were no witnesses, but they are reinforcing the ALJ’s finding. The fact that there are no witnesses after a supposed “interrogation” took place made it difficult to believe there was ever any questioning about Castillo at all.

The GC states “there could have been no corroboration” but that is also not true. (GC brief pg. 38). There could easily have been witnesses or testimony to corroborate at least some parts of Gomez’s testimony. A fellow employee could have witnessed Gomez getting into the car with Palacios, or at least another employee at Jamaica Car Wash could have corroborated that Gomez and Palacios spent nearly an hour off the premises to buy pans for the car wash. There could have been corroborating evidence of questioning by Palacios in regards to Castillo by word-of-mouth after the alleged interrogation. The ALJ references this by noting that “Gomez never testified that he had reported this alleged interrogation to Hernandez even though Gomez knew that Hernandez had inquired about the circumstances of Castillo’s employment with management just three days earlier at the February 25 meeting.” (ALJD 22:45-47). The purpose of this clarification is not improper or a contravention of Board law, but rather to show how it is difficult to believe that any questioning took place when Gomez never told another person about it, not even the shop steward Hernandez who was already investigating the alleged discharge of his cousin, Castillo.

Even if the ALJ had conducted a full analysis using each *Bourne* factor it would still have found in favor of the Respondent. The *Bourne* factors are: (1) The background, i.e. is there a history of employer hostility and discrimination; (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees; (3) The identity of the questioner, i.e. how high was he in the company hierarchy; (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'? (5) Truthfulness of the reply. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

To the first *Bourne* factor, it is set throughout the record that Palacios, who allegedly conducted the interrogation, had a very fine relationship with the union. There was no history of employer hostility or discrimination. To the second factor, the nature of the alleged questioning, if any questioning actually occurred, was only in reference to the union's representation of Castillo who was no longer an employee which means Palacios could not have been seeking information on which to base taking action against then-current individual employees. The ALJ noted this when stating "Gomez never testified that he felt intimidated or coerced or even believed that his job was in jeopardy when Palacios spoke to him in the car." (ALJD 22:47-49). To the third factor, Palacios is a manager of the car wash so he is in a position of authority. However, to the fourth factor, the atmosphere of the alleged interrogation was very informal – it supposedly occurred on the way to buy pans for the car wash. Lastly, the answers to the supposed questions by Gomez, as far as anyone can tell, were truthful, i.e. there was no evidence that the alleged interrogation actually inspired fear. *See id.*

Finally, it is not improper for the ALJ to look outside the *Bourne* factors to decide if an interrogation is unlawful or lawful. The GC makes note of this in a passing remark stating that "This test involves a case-by-case analysis of various factors, including those set out in *Bourne*" (GC brief pg. 38). The *Bourne* factors are not an exclusive list by which the ALJ must make his decision on the interrogation. The *Bourne* factors are only "some factors that should be considered" in determining if an unlawful interrogation occurred. *Burns Electronic Sec. Services, Inc. v. NLRB*, 624 F.2d 403, 411 (2d Cir. 1980). The ALJ attempted to determine if any questioning actually occurred in addition to these factors. Upon the review of the record and credibility determinations, the ALJ found that "the alleged interrogation in Palacios' car never occurred." (ALJD 22:34-35). At least this finding, if nothing else, is very easy to discern.

V. *Exceptions 22-41: The ALJ Erred by Failing to Find that Respondent Unlawfully Terminated Castillo*

The GC states that the ALJ's decision found that since Castillo was not shown to be engaged in union activity, he was therefore not terminated illegally. Moreover, the Respondent had no knowledge of any activity. The GC submits that since the Respondent "believed" Castillo was engaged in union activity that fact fully supports the animus for discharging him. The ALJ found that Castillo abandoned his job. Again, the GC must be able to prove Castillo was discharged for some pro-union reason or belief of such because without that proof there is no Charge that could be sustained. It all hinges on those two meetings of mid-December and February 28 alleged by Gomez.

Wright Line

The GC alleges that the ALJ used the incorrect framework when deciding whether Respondent unlawfully terminated Castillo. However, the GC misunderstands the *Wright Line* framework and why it necessarily applies in this case. The GC states that "it is well settled Board law that terminating an employee because of a respondent's belief that the employee engaged in protected activity is unlawful and violates Section 8(a)(3) of the Act." (GC brief pg. 41). The GC's argument is of course pretextual and is based on the presumption that 1) Castillo was fired by Respondent, and, 2) that Castillo was fired because of a belief that he was participating in protected activity. The ALJ had found that both of those factors did not occur, which is one reason the ALJ did not conduct an analysis under *Monarch Water Systems*.

Furthermore, the *Wright Line* would be proper either way because the Respondent's motive is at issue. (ALJD 24:6-7). The *Wright Line* analysis is meant to analyze dual-motive cases where an employee's termination may have been motivated by union activity as well as legitimate reasons for allegedly discharging an employee. *Alternative Energy Applications, Inc.*, 361 NLRB 139, 142 (2014). The dual motives which could be entertained in this case are that 1) Castillo would soon be engaging in protected activity with the union or 2) that the weather had caused reduced hours for some employees during the week of December 20, 2015.

The GC proposes a different analysis that assumes, incorrectly, that Castillo was fired by Palacios and that the reason for such firing was because of believed union activity. The ALJ found that no firing had occurred and that there was not a belief of union activity. Furthermore, even if the ALJ had found that Castillo was fired, Palacios's motivation was still at issue. The GC contends that Castillo was discharged solely for purported union support while Palacios denies ever believing that Castillo had supported the union. Therefore, ALJ proceeds correctly under the *Wright line* analysis.

Despite the ALJ ruling to the contrary, the GC's argument is that Gomez testified that Palacios said he would dismiss Castillo for his union activity. While the GC protests the ruling, the ALJ found the Palacios/Gomez mid-December meeting and the February 28th meeting did not take place. The GC believes the ALJ based this ruling solely on the fact that Gomez did not tell anyone of the meetings, including Hernandez the shop steward. The entire decision is much more comprehensive wherein the ALJ set forth several findings and reasons why he believed those meetings never occurred.

The fact that Gomez was not dismissed is irrelevant to the GC but not to the ALJ. How the GC believes Gomez did not pose the same risk as Castillo toward “getting rid of the union” is bewildering. They were both hired at the same time and no evidence of pro-union activity by either one admittedly was presented. However, the GC pursued the theory that the Respondent only considered one of them a problem. That theory is unsupported by any record or exhibit.

One of the theories of the GC was to show Castillo’s union activity by quoting Hernandez, the shop steward, when he testified to something he believed Magalhaes said even though Magalhaes denied it. A fact that should be considered here is that Vasquez, an employee, testified that there was no anti-union animus at the job. The GC did not have one employee testify to any of these theories.

The GC has stated in their exceptions here that Palacios did not deny meeting with Gomez in mid-December, 2015. They also state that Palacios never denied telling Gomez he was going to fire Castillo because he heard he was with the union. The Respondent is puzzled as to where in the record did Palacios make such an admission? He did specifically deny firing him. (Tr. 34). The GC never questioned him of any meeting in mid-December. (Tr. 22-114). Clearly Gomez recollects such a meeting but Palacios was never asked by the GC about this meeting, and they do not cite to relevant questions from the transcript that would support this argument. It is disingenuous for the GC to use Palacios’s non-denial of the meeting as evidence because he was never asked about the meeting.

The meeting that Gomez said he had with Palacios form the basis of many conclusions of fact and law by the GC. There can be no criticism of the ALJ decision where the ALJ found the meeting did not take place and sets forth the reasons. The GC can argue Gomez is telling the truth and if he was, then certainly that would present an issue for the Respondent. However, whatever the GC might dislike or disagree with the ALJ finding; it was ruled that these conversations never happened and the Respondent relies on the reasons set forth in the ALJ's decision.

The GC alleges that Hernandez testified to statements by Magalhaes prove anti-union animus which Magalhaes did not deny. However, the GC exaggerated what Magalhaes testified about. Magalhaes as well as Palacios testified that there is a clear benefit to having the union. In fact, he stated the union and the carwash had a cordial relationship that benefited both sides. Vasquez supported that fact and the ALJ took note of his testimony on that point. To take a comment by Magalhaes out of context and float it as proof of anti-union sentiment is plainly dishonest. Even a cursory reading of Magalhaes's testimony reveals he had no problem with the union nor did Palacios. Furthermore, the absence of any evidence to the contrary by the GC reaffirms the point. There was not one grievance or arbitration ever conducted between the parties. The GC states there was ample evidence but that evidence was nothing more than an isolated out of context statement about a minor dispute about bonus payments.

In their brief, the GC states often that the ALJ is wrong, incorrect, or improperly dismissed a violation because it was based on improper factors, i.e. no corroboration, in their conclusion alone without setting first any reasoning why they state such. For the GC to state “the record reflects with evidence” and then failing to cite any evidence is also irresponsible and nothing more than unsupported thinking by the GC. Again, the GC must base all their allegations on the alleged February 28th and/or mid-December meeting between Palacios and Gomez which has been rejected by the ALJ.

The GC believes the ALJ ruled that the only way to prove discriminatory motive is through contemporaneous 8(a)(1) violations. They then cite to the fact that 8(a)(1) violations are just one factor to be considered when analyzing discriminatory motive. They fail to note that the ALJ specifically stated on page 16 of the decision that: “8(a)(1) violations do not form the employees motive or on whether the coercion succeeded or failed.” *NLRB v. Gissel Packing Co.*, 395 US 575 (1969). Our reading of the ALJ decision demonstrates there were many parts of the five days of testimony analyzed by the ALJ in addition to the testimony of Palacios. The ALJ continued analyzing 8(a)(1) points throughout the decision by commenting on all the testimony and exhibits produced at trial.

The GC states they analyzed the Respondent’s specific animus and disparate treatment of Castillo. Again, their sole and singular reliance is on the Palacios/Gomez conversation and the December 3rd interview. (GC brief pg. 46).

The GC’s version of what happened the week of December 21, 2015, is completely distorted and based only on the evidence they could find from the testimony of Castillo and Gomez.

There is no question the business had no set formal procedures or protocols after it rained except

that both management and/or employees should call in and see if the business is open on that day. This was not a refined system and could change very easily and was meant to be flexible.

The GC at trial, their brief, and on appeal presented a few texts and a voice recording that firmly established: (a) Castillo was not fired or discharged by traditional language that would give any reasonable person a clear belief they are terminated; and, (b) there was substantial rain the last week of December 2016 and the availability of work for the Respondent carwash was limited and determined daily.

Prior to commentary on the GC's NLRB case law citations on discharge, it should be noted exactly what Palacios testified to in (Tr. 36-38). In that testimony, Castillo stated he needed the job and he wanted to work but because of the rain, he was not brought in for that day. (Tr. 41). It rained through December 25th but Palacios told him he could pick up his check on December 21st. While the rain lasted through the week, Castillo called December 24th and spoke to Magalhaes because Palacios was unavailable due to medical reasons. Palacios specifically stated, in response to the ALJ's question, that he was going to let Castillo know when to come in and that was when business re-opened. (Tr. 45-46). Late December 2015 business was not good and Respondent had more than enough workers at that time. (Tr. 47). However, if they needed Castillo for a shift they would call him. There was no question Castillo wanted to work at the car wash. Palacios told him that if he did not call him, he should call the car wash. (Tr. 48).

The GC decided not to mention the foregoing in their brief. Instead, they selected quotes and makes the inference that Castillo was fired. There is no question the texts and the recording form the basis for the GC's belief that Castillo was fired. It is just not the truth. The recording never disclosed anything more than there was no work at the "moment" which Castillo interpreted to mean "no work at the moment" (Tr. 236). The ALJ repeatedly noted that while neither Castillo nor Palacios said that word on the recording, nevertheless, the ALJ credited Castillo's testimony when he actually used that word "moment" to explain what he understood as "no work for the moment."

The entire conversation between Palacios and Castillo never involved words of discharge. It was entirely about whether Castillo's services were needed because of the weather and the available work. The car wash had never fired anyone in the past. Castillo and the GC then opined that Palacios to "look for" work is direct proof of termination. The GC was unwilling to accept that the statement was actually a suggestion that Castillo should temporarily look for some other work until the weather cleared and the need for laborers at the carwash returned to normal. The Respondent zealously argued that those words were not words of termination and day-work is a concept that employees of Jamaica Car Wash are familiar with. Moreover, Castillo's name appeared on the schedule for January 2016 (R2) which was fully noted by the ALJ. The ALJ reasoned all of this on page 27 of the decision, which is also corroborated by the transcript. (Tr. 36-48).

Castillo was working only for three weeks and thus was still a probationary employee. Consequently, he could have been discharged without any objection from the union. Obviously, if he was discharged for engaging in protected activity he could not be discharged. The GC admits throughout their brief there was no union activity. It comes down to “belief” the Respondent allegedly had according to the GC.

In summary, the GC’s theory is the Respondent wanted to discharge Castillo as of mid-December, but waited until rainy weather so as to cleverly discharge him without having to say “you are fired.” They knew his cousin Gomez was still working and they would not discharge him according to the GC. So, they waited 12 to 15 days to carefully do it when it rained. When reading the remainder of the ALJ decision, it defies logic and common sense that there was a careful and calculated discharge. It is too far-fetched that such a plan was put together by the Respondent. Presumably the GC would argue the fact that Castillo was on the schedule Jan 3, 2016 is nothing more than part of their elaborate plan to cover their tracks and “anti-union animus.” The GC exaggerated the words by interpreting the foregoing words to mean “look for another job” equating it to a discharge. That is the opinion of Castillo and the GC, and nobody else.

There was no crucial testimony ignored by the ALJ. The use and examination of the word “now” and “moment” were just part of the decision and not the only factor used by the ALJ in making his decision. One point for sure both sides must agree upon is that Castillo was never told to leave. What the argument rests upon is the Respondent and the ALJ interpreted the statement that there was no work “at the moment” or “now” to mean at that time, while the GC conveniently interprets that to mean he was discharged.

Castillo's Testimony

The Board need only review some of Castillo's testimony to come to the clear conclusion that he did not testify credibly. He testified he noticed there was "a lot of work" at the car wash for both days and yet he was not there to see any such work. (Tr. 193). Castillo would like the ALJ to believe that he only had to wait for a call from the manager and yet he testified that Palacios gave him his number to call him. (Tr. 193). He then testified either he or Palacios should call. (Tr. 220).

Castillo knew he could only work if his name was on the schedule and call if it was raining. (Tr. 197). Castillo testified, "he didn't need me to work at that moment. If snow came down he was going to let me know and call me – call me and let me know." (Tr. 201). Hence, that seems clear that Palacios would call if he needed him but not at that time or moment. His testimony then became erratic and convenient when he testified that "moment" means "fired." The ALJ questioned him and Castillo believed that he should have gotten a call and since he did not, that is proof of the discharge. (Tr. 202). After further questioning by the ALJ, Castillo admitted that he understood that more people work at the carwash when the weather is better than it was on the week of December 20th. (Tr. 203). Since Castillo did not get a call by December 24th or 25th, due to the rain, he seemingly decided to find another job, as Gomez told Palacios. No termination had ever occurred, even according to Castillo. (Tr. 204, Line 2).

Castillo was very clear in all his conversations, texts and recordings – he needed the job. (GC brief pg. 51). He really wanted to work at the car wash. He admits that either he or Palacios would make the call to see who is working since there was no formal procedures or protocols as to who places the call. Castillo never called the car wash after December 25th and the car wash never called him. There was a reason for that; management was told that Castillo took another job elsewhere by his cousin, Gomez. The evidence of that fact is that Castillo never called on December 26th through January 1, 2016. His name actually remained on the schedule after January 1, 2016. (R2). Castillo never saw his name on that schedule because he unilaterally stopped reporting to work.

Castillo started working for the Respondent after an alleged 20-minute job interview where Palacios allegedly said the union is no good and they wanted to get rid of the union. Castillo was then asked if he ever talked to any co-employee about what Palacios said in their interviews about the union. He said – No – “nothing.” (Tr. 212). Then he was asked what was said, if anything, by any co-employee about the union and he stated “nothing.” (Tr. 218). What is more interesting is that the line of questioning to Castillo on whether he spoke to any co-employees or whether they spoke to him was a subject the GC and their co-counsel did not want Castillo to answer and the record is riddled with objection after objection. Obviously, the GC did not want him to answer such a revealing question.

The point here is neither management nor the employees spoke of the union because there was nothing to speak of. There was no anti-union animus with anyone and no issues with any employees. The likelihood that Palacios said anything negative about the union to a new hire is preposterous. It just does not make sense given the cordial working relationship for three years. It also defies logic that shortly after Palacios interviewed him, he immediately began denigrating the union and, and Castillo's response was about benefits.

The GC is correct in asserting that the Board has held that discharge does not depend on the use of formal words of firing. *Hale Mfg. Co.*, 228 NLRB 10, 13 (1977), *enfd.* 570 F.2d 705 (8th Cir. 1978). It is sufficient if the words or action of the employer "would logically lead a prudent person to believe his [her] tenure has been terminated." *NLRB v. Trumbull Asphalt Co.*, 327 F.2d 841, 843 (8th Cir. 1964). However, the GC is incorrect in stating that his finding that Castillo was not terminated is a "reversible error" and is also incorrect in speculating that had the ALJ considered these precedents, the ALJ would have found that Castillo was discharged. (GC brief pg. 48). In the ALJ's decision, he uses Castillo's own testimony to establish that Castillo understood that there was only no work for him at the moment. (ALJD 26: 36-37).

Furthermore, the ALJ finds that because of the flexible schedules at the car wash and how they are affected by the weather that there was no discharge because of the communications that took place between December 20th – 24th. Schedules are often set weekly, and there is not always enough business to use every single worker every single week. Calling between December 20th and the 24th would not change the schedule for that current week. Also, it was too early for the schedule to be made for the following week. That is why the Respondent still did not have any working hours to give to Castillo. The ALJ understands the nature of running a business that relies on fair weather and that a week with bad weather can slow down business to the point that they will not be able to utilize every single worker. This is also why Palacios told Castillo to look for another job – not because he was discharging him, but rather because he should not rely on his job at Jamaica Car Wash alone as his only source of income because the work is seasonal and can change according to the weather.

There are substantial arguments in the GC’s brief attempting to persuade the Board that words like “moment” and “now” irrefutably demonstrate that as they were stated, they had the meaning of discharge. The Respondent and the ALJ disagreed. It may have been Castillo’s understanding, although the Respondent disputes that fact. It cannot be overstated that if Castillo needed the job, and the accepted procedure was that both sides would call in the event of bad weather, why didn’t Castillo call when the weather cleared? Perhaps had he called, this proceeding would never have occurred.

In one of their last arguments concerning the alleged discharge of Castillo, the GC tried to show the punch records of the Respondent to show there was work available and Castillo was ignored because he was fired. The GC neglects the fact that Palacios explained that for the last week of December 2015 with so much rain, only a few workers were needed to clean the carwash and few employees were needed because there were not many customers. Tr. 79. The GC selectively ignores the fact that by late December, Palacios had been told by Gomez that Castillo took a job elsewhere. (Tr. 85).

Finally, the claim that the carwash hired employees to replace Castillo is not true. The car wash hired a single person named Garcia every year around the holidays. He was a seasonal employee. It was something they did regardless of how many employees they had hired. There was a bond and friendship with Garcia and he worked every holiday season. His hiring is not by any means a replacement, but rather a seasonal routine hiring.

VI. *Exceptions 42-50: The ALJ Erred in Failing to Find That Respondent Unlawfully Refused to Reinststate Castillo.*

The GC believes the ALJ was wrong because he believed that the GC was maintaining that the union sought Castillo's reinstatement via Hernandez and then decided there was no request by the union. Magalhaes testified that the union petition sought Castillo's reinstatement even though that petition was from workers at a different car wash who had no personal knowledge of the facts. It was not an officially sanctioned union petition and Hernandez did not even know about it.

The GC's argument here is difficult to understand. Looking at the ALJ decision, it seems clear that on February 25, Hernandez sought reinstatement of Castillo. The response was relatively simple by Magalhaes – he never discharged him so he was not calling him back to work. Magalhaes was convinced after inquiries that Castillo was unreachable. At that point, there was no refusal to rehire. Castillo could not be found and neither the union nor the Respondent knew where he was. As aptly noted by the ALJ, the car wash business is transitory. Workers come in and out relatively often. Castillo had left and it created no issue for either side.

Hernandez requested Castillo's reinstatement on February 25 which Magalhaes denied. Castillo at this time was nowhere to be found. The meeting on February 25 was a meeting called by Magalhaes to explain the Castillo situation – nothing more. Hernandez's testimony reveals he never requested reinstatement nor did Castillo ever request the same.

VII. *Exceptions 51-62: The ALJ Erred in Failing to Find that Respondent Engaged in a Johnnie's Poultry Violation*

The GC submits the ALJ utilized the improper legal framework and ignored key evidence in finding that the Respondent gave employees proper assurances required under *Johnnie's Poultry* before a June 2016 meeting. The GC primarily contends that the ALJ improperly utilized the *Rossmore* and *Bourne* line of cases in analyzing the alleged June interrogation instead of using *Johnnie's Poultry* exclusively. The GC further contends the ALJ misapplied the *Johnnie's Poultry* analysis and misstated or ignored facts in the record.

Legal Framework

The GC alleges that the Respondent failed to give proper assurances as required by law under *Johnnie's Poultry* prior to interrogating employees in preparation for trial. The GC criticizes the ALJ's decision by claiming that the ALJ "first improperly discussed general threats of retaliation and Board law regarding threats of retaliation." (GC brief pg. 62). The GC claims that the ALJ should not at all have relied upon the *Rossmore House* and *Bourne* line of Board cases in analyzing the alleged interrogation and questioning of employees in June 2016. The GC concludes this analysis by quoting *Bill Scott Oldsmobile* to prove the Board's rejection of the *Rossmore House* analysis in determining the lawfulness of an employee interview in preparation for trial by an employer. 272 NLRB 1073, 1075 (1987).

However, the GC neglects to mention that *Johnnie's Poultry's* status within the Second Circuit is tenuous, if not completely inapplicable. The Second Circuit has evaluated unlawful interrogations by the *Bourne* and *Rossmore House* line of cases for decades. *Gaetano & Assocs., Inc. v. NLRB*, 183 Fed. Appx. 17, 22 (2d Cir. 2006); *NLRB v. Monroe Tube Co.*, 545 F.2d 1320, 1328 (2d Cir. 1976); *Trico Products v. NLRB*, 489 F.2d 347, 352 (2d Cir. 1973) (test "applied in

cases too numerous for citation"); *NLRB v. General Stencils, Inc.*, 438 F.2d 894, 899 (2d Cir. 1971); *NLRB v. Dorn's Transportation Co.*, 405 F.2d 706, 713-14 (2d Cir. 1969); *NLRB v. Lorben Corp.*, 345 F.2d 346 (2d Cir. 1965). The Second Circuit has rejected *Johnnie's Poultry* and instead has proceeded under *Bourne* as far back as 1965 when the Court in *Lorben Corp.* ruled the following in regards to *Johnnie's Poultry*:

“Recently, the Board has withdrawn from this more comprehensive approach and has sought to establish the rule that employer interrogation is coercive in the absence of a showing that (1) there is a valid purpose for obtaining the information; (2) this purpose is communicated to the employees; and (3) the employees are assured that no reprisals will be taken. . . the Board found that Respondent had committed an unfair labor practice simply because of 'the manner in which the poll was conducted, particularly the fact that Respondent did not explain the purpose of the poll to all of the employees, and did not offer or provide any assurances to the employees that their rights under the Act would not be infringed.' To enforce the Board's order which rests on this narrow ground alone, would be to depart from the line of decisions of this Circuit cited above, once approved by the Board, and we are not so inclined.” 345 F.2d 348 (emphasis added).

The Second Circuit's rejection of *Johnnie's Poultry* has been recognized by other circuits, including the Seventh Circuit: “The Second Circuit has not followed *Johnnie's Poultry* and employs its own ‘totality of the circumstances’ test for coercion.” *A&R Transport, Inc. v. NLRB*, 601 F.2d 311 (7th Cir. 1979) (citing *Monroe Tube Co.*, “Whatever may be the rule elsewhere, it is clear that this interrogation is not improperly coercive under *Bourne*,” 545 F.2d 1320, 1328 & n. 16 (2d Cir. 1976)).

The ALJ did not apply the *Rossmore House* and *Bourne* analyses without purpose. The ALJ used these analyses in addition to *Johnnie's Poultry* because *Bourne* and *Rossmore House* is the analysis within the Second Circuit. The GC did not point to any holdings in the Second Circuit that uphold the *Johnnie's Poultry* rule of strict compliance and in fact only cites to *A&R Transport, Inc.*, which also declined to adopt the Board's position that failure to adhere strictly to the safeguards set forth in *Johnnie's Poultry* constitutes a per se violation of §8(a)(1). *A&R*

Transport, Inc., 601 F.2d 311 (holding “We join with other circuits, however, in declining to approve a Per se rule and instead will look to the totality of the circumstances”). The ALJ applied *Rossmore House/Bourn* and the *Johnnie’s Poultry* standards in order to comply with both Board law as well as the law of the Second Circuit and therefore should not be reversed.

The ALJ Correctly Dismissed the *Johnnie’s Poultry* allegation

The GC alleges that the ALJ improperly dismissed the *Johnnie’s Poultry* allegations because the ALJ failed to recognize the testimony of Donald Montezuma and Eduardo Vasquez alleging that Magalhaes never gave the *Johnnie’s Poultry* assurances, specifically that Magalhaes failed to assure Vasquez that the questioning was voluntary and there would be no reprisal for his testimony. The GC fails to address the ALJ’s most important finding: “I find there was no interrogation of Vasquez” (ALJD 32:31).

Johnnie’s Poultry articulates safeguards necessary to privilege an employer from 8(a)(1) liability where the employer or its counsel chooses to question employees on matters involving their Section 7 rights in preparation for a hearing on an NLRA matter. *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964), enf. Denied on other grounds 344 F.2d 617 (8th Cir. 1965). The witness upon whom the GC relies, Eduardo Vasquez, testified that nobody was questioned during that June 2016 meeting:

Q: What did Mr. Fernando Magalhaes say to you during that meeting?

A: He just told me he had not fired the young man, talk about the young man.

Q. But he asked you questions too, right?

A: Who?

Q: Fernando.

A: No.

Q: Did he ask questions of the other employees there?

A: Like to whom?

Q: Anything.

A: No. (Tr. 374).

The purpose of *Johnnie's Poultry* is to ensure that when an employer interviews an employee about protected activity in preparation for an unfair labor practice hearing, the employer communicates to the employee the purpose of the questioning, that there will be no reprisal, and the employee participate on a voluntary basis. The GC's critical error in their submission is failure to identify the moment when the alleged interrogation took place. Unlike the alleged February 28 meeting between Palacios and Gomez, the interrogation of Vasquez appears to have never occurred.

Furthermore, the GC submits that Montezuma was interrogated. However, the ALJ found that Montezuma is an Assistant Manager. Therefore, even though he may have been questioned by Magalhaes, it is not possible for this questioning to be a *Johnnie's Poultry* violation because he is not an employee whose Section 7 rights can be violated. The GC contests this point by stating that Montezuma is not an "admitted supervisor." (GC brief pg. 66). However, the GC does not establish that Montezuma is an employee and neither does the GC except to the ALJ's finding that Montezuma is an Assistant Manager. Montezuma is not an employee. He, along with Palacios, was responsible for the hiring of new employees. Therefore, the questioning of Montezuma does not establish that "Magalhaes questioned at least one employee about Castillo's termination without giving all three *Johnnie's Poultry* assurances" when it is not even established that the supposed person questioned was an employee. (GC brief pg. 66).

The GC's final submission regarding interrogations of employees is Montezuma's testimony that both he and Palacios asked workers about the termination of Castillo. However, this testimony is inconclusive and unclear. The testimony by Montezuma testified that he did question some employees about what happened to Castillo. However, the testimony is not clear on when the questioning took place. The transcript is rife with objections and conversation amongst the attorneys between pages 295 and 302 that the witness may not have understood what "meeting" the GC was referring to. This led the witness to testify:

Q: Did Fernando ask the other employees any questions?

A: Not Fernando, but Israel and I, we were asking the other workers. And we asked Francisco Gomez, who lived with him, what happened to him --

Q: But sire you said -- you didn't say Francisco Gomez was present in the room.

A: No, no.

Q: Okay. So I was asking about that particular meeting, the employees who were in that room for that meeting with Fernando.

A: Okay.

Montezuma was unclear as to the period of time that the GC was referring to, and the counsel for GC conducting the cross-examination stopped to correct Montezuma. By testifying that he questioned Gomez, who the GC notes was not at the meeting, Montezuma contradicts his earlier testimony. He also was never able to clarify when and how any questioning had taken place. There were a few meetings with Fernando to which the GC could have been referring. The testimony is uncertain and from that alone it is not possible to tell whether the employees were questioned at the June 2016 in anticipation of the litigation or half a year earlier in January.

The ALJ properly found that Vasquez's participation was voluntary and without reprisal.

The GC submits that the ALJ incorrectly interpreted the record in finding that Vasquez testified that Magalhaes told him that it did not matter how he testified. The GC only provided testimony regarding Vasquez's testimony at trial. None of these pieces of testimony refer to any interrogation which took place prior to the trial. The GC also does not put forth any caselaw or Board law which extends *Johnnie's Poultry* safeguards of interrogations to the actual trial of the NLRB dispute. The Respondent's counsel is unable to locate any Board decisions that apply *Johnnie's Poultry* to the actual trial itself, and rule that the employer must give *Johnnie's Poultry* safeguards to witnesses at trial.

Finally, the GC criticizes the ALJ's decision in crediting Vasquez's testimony that he testified of his own free will. According to the GC, Vasquez's testimony was general and vague and did not constitute testimony that Magalhaes told him that his testimony was voluntary. However, the GC should and the Board should grant some leniency to the witness's testimony and the Respondents because English is not their first language. It is clear that Vasquez's testimony that he is "free" to testify is somewhat contradictory to his testimony earlier that he was never told specifically that he had the choice of whether or not to testify. (Tr. 372-373). Earlier in the testimony it was shown that there were some issues with the translator as well as miscommunications between the witness and the GC. In light of the communication issues the ALJ saw it fit to ask the question in a different way in order to get a direct answer from the Witness on whether his testimony was voluntary. Furthermore, it is likely that similar communication issues may have occurred before the alleged testimony. Since English is not the first language of Magalhaes or Palacios it is very likely they did not use words similar to those in *Johnnie's Poultry* or similar to the questions asked by the GC. The ALJ made his assessment

based on the credibility of the witnesses as well as their demeanor when they testified. So, while the Respondent may not have used the exact words from *Johnnie's Poultry*, the ALJ found that through the testimony that such safeguards were essentially guaranteed by the Respondent no matter how much was lost in the literal translation.

CONCLUSION

The Exceptions submitted by the GC do not establish that the ALJ's decision was factually or legally incorrect. The ALJ decision was based upon prevailing NLRB and Second Circuit law.

An employee who worked for three weeks and never engaged in or spoke of the union cannot be assumed to have been fired due to alleged union activity. This is especially true given the notable absence of any evidence demonstrating any activity and/or motivation. The entire hearing was based upon the hearsay testimony of Gomez and Castillo who were found to be incredulous and inconsistent.

The Respondent relies on the transcript testimony, the Respondent's summation and the ALJ's analysis in urging the Board to affirm Administrative Law Judge Chu's decision in this matter.

Respectfully submitted,



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**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

JAMAICA CAR WASH CORP.

And

**RETAIL WHOLESALE AND DEPARTMENT
STORE UNION (RWDSU)**

Case No.: 29-CA-169069

Date of Emailing: April 7, 2017

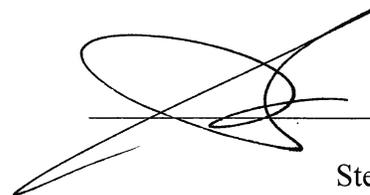
**STATEMENT OF SERVICE:
BRIEF IN RESPONSE TO EXCEPTIONS
FILED BY THE GENERAL COUNSEL
ON BEHALF OF JAMAICA CAR WASH**

I, the undersigned counsel and attorney for the Respondent in the above-captioned matter, hereby state, under penalty of perjury that, in accordance with NLRB Rules & Regulations §102.114(i), a copy of the foregoing was sent to each party at the addresses listed below via electronic mail and on the date indicated above.

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